Michigan Journal of International Law

Volume 2 | Issue 1

1981

Structural Aspects of Multinational Corporate Trade with the Nonmarket Economies of Eastern Europe: An MNC Perspective on Domestic and Foreign Regulation

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In considering the structural aspects of multinational corporate trade relationships with the nonmarket economies of Eastern Europe, it is important, as a preliminary matter, to acknowledge certain intractable features of that trade. Only through a continuing awareness of the interplay of these factors can one hope to understand the role of law or regulation in trade with these states.

Foremost is the recognition that the multinational corporation (MNC), in dealing with a nonmarket economy, is entering an economic environment with assumptions antithetical to its own. To the extent that the MNC hopes to satisfy the trade demand of the nonmarket state, the MNC must allow for a margin of compromise and deviation from its normal modes of doing business. Such an approach, however, is necessarily mutual; the nonmarket economy government, to the extent it seeks to engage in international trading relationships with the Western market economies, must do so in partnership with the latter's evolutionary modality of international trade, the MNC. In so doing, it must also compromise somewhat in its ideological and practical requirements.

This need for pragmatism and compromise is being recognized to varying extents by the nonmarket economies of the Council for Mutual Economic Assistance (CMEA).[1] Their economic imperatives have led to a blossoming of trade with MNCs, especially from the United States and the Federal German Republic, as well as from the other Western democracies. Their Marxist principles have been compromised within their domestic economies to meet the requirements of foreign investment. For example, the Soviet Union and

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Poland have recently indicated their willingness to work with capitalist resources in the form of leased equipment.[2] A number of organizations from the CMEA states have established themselves in the market economies[3] and for a number of years the Soviet Union has been operating a bank in Switzerland.[4]

Without such flexibility on the part of these regimes, the complicated commercial arrangements which exist today between the CMEA members and the Western MNCs could never have developed. Although these developments have opened up a large market for U.S., Western, European, and Japanese business, it can be argued that this trade has been equally important over the past decade for the political stability of the Eastern bloc, particularly some of the satellite states, in that it has contributed to a move toward consumerism.[5]

The practical difficulty that arises for purposes of this inquiry, then, is how to produce regulations which are representative of the various economic systems at play in the world, since any regulation which lacks the mutuality necessary for cooperation between such competing philosophies may tend to stultify the natural evolution of international industrial cooperation.

The second important factor which affects the current structure of MNC-CMEA trade relationships is the serious economic problems which the CMEA states are experiencing.[6] Over the last few years these countries have financed their growing demands for Western goods and technology by borrowing in the Western convertible currency market. At the same time they have run up a trade deficit with the Western democracies of U.S. $3.3 billion.[7] This means today that many of the CMEA countries have exhausted their convertible currency reserves and have little or no such currency left, either to buy goods and technology, or even to service their outstanding loan obligations.

With an outstanding convertible currency debt at the end of 1978 of U.S. $15 billion out of total CMEA indebtedness of U.S. $38.8 billion, Poland seems to be in the most perilous condition. At the present time many European bankers view this situation with deep concern. However, this concern is not shared by their North American colleagues who anticipate an increase in convertible currency exposure which will hopefully be funded by the planned increase in exports by the Eastern bloc.

This convertible currency problem which in fact emanates from the failures of the CMEA economies to achieve their planned goals, affects both the satellite CMEA states and the Soviet Union. In 1978 the Soviet deficit in trade with the West increased dramatically, partly due to increased grain purchases which it was forced to cover in part by selling its entire annual production of gold. In 1979 it was projected that the grain harvest would be even worse, the U.S. Department of Agriculture expecting a 50 million ton shortfall. The consequent purchases of grain in convertible currency will put an additional strain on the Soviet Union's ability to purchase Western technology and equipment over the next year.[8]

Such economic developments dominate all aspects of East-West trade today and in particular have led to a vast barter system between the Western industrialized democracies and the CMEA bloc. The impact on MNCs of this trading pattern, commonly called *countertrade,* will be discussed later.

The final factor in the relationships between MNCs and CMEA states which cannot be underestimated is the impact of wholly independent political decisions. Though this factor is not limited to trade with the nonmarket economy states, the monopolistic organizational structure of foreign trade in the socialist countries renders it peculiarly and immediately susceptible to variations in the political climate between the two national trading partners involved.

Bearing in mind these critical factors, this article will discuss the following particular aspects of MNC trade with CMEA states: (1) the organizational structure, in general, of foreign trade with nonmarket economies, (2) the impact of domestic antitrust law on MNC trade with CMEA states, and (3) recent developments in CMEA regulation which affect the structure of trade with MNCs.

THE GENERAL ORGANIZATIONAL STRUCTURE OF MNC TRADE WITH CMEA STATES

In dealing with nonmarket economies, the MNC enters an economic environment inimical to its own. Thus it is worthwhile to reconsider certain basic aspects of socialist trading and economic concepts.

The long-term consequences for the socialist states of the penetration of their domestic markets by capitalist enterprises provides one of the most interesting perspectives on the growing East-West trade relationships. Many in the West feel that such developments are essential for world stability and may lead to some relaxation in those states both in terms of the flexibility of their economic concepts and also in human freedoms.[9] In fact, there are signs that this is already happening. Moreover, the Soviet Union appears to be equally enthusiastic. Professor Maximova, of the Institute for World Economy and International Relations in Moscow, said recently: "We are not going to demand that Western countries should give up their traditional system of economic management, although as Marxists we consider it to be a transitional stage giving way in the future to a more progressive form—a planning system of economic management."[10] Whether in fact this position can be supported in the light of recent trends, such as the move toward leasing aforementioned and the approaches contained in new foreign investment legislation to be discussed, is perhaps open to question.

MNCs, in their relations with CMEA members, must deal with a number of monopolies. The state has a monopoly in all economic activities, both internal and external. Article 14(h) of the *Constitution of the Soviet Union* states: "The competence of the Union of Soviet Socialist Republics, as represented by its highest agencies of state power and agencies of state administration shall embrace . . . foreign trade on the basis of a state monopoly." Within the statewide economic monopoly operate lesser monopolies.[11] The state delegates to its specific agencies specific monopolies, somewhat as the Crown in England granted monopolies in the Middle Ages, the vestigial remains of which are the patent monopoly. Of course, the Ministry of Foreign Trade has a monopoly in all aspects of foreign trade.[12]

These lesser monopolies are further diluted. Under the aegis of the Ministry of Foreign Trade state agencies are established and granted a monopoly in certain aspects of foreign trade. These agencies are denominated foreign trade organizations (FTOs).[13]

These state companies are founded by a ministry of state or other organ of national authority, and under the laws of the respective socialist states are considered independent legal indentities. The state provides them with certain assets which they may use independently. They are liable for the discharge of their obligations up to the amount of the assets entrusted to them and these assets cannot, generally speaking, be removed from their control.[14]

The juridical independence of these state foreign trade organizations has been recognized judicially in a number of Western countries.[15] Nonetheless FTOs, in fact, work under the close supervision of their founding agency.[16] Moreover, the power of the executive in the socialist countries to issue regulations and instructions and to informally govern all activities within the state is vastly greater than is the case in the Western democracies.

This actual and implict interrelationship between the FTO and the state through the Ministry of Foreign Trade is the inevitable consequence of the socialist concept of a planned economy.[17] The activities of the FTO are governed by its annual and five-year plans, which are a part of the annual and five-year plans of the Ministry of Foreign Trade, which are in turn a part of the overall state annual and five-year plans. These plans are a synthesis of the plans of all the component parts of the state apparatus; once accepted by the Communist Party and, in the case of the Soviet Union, by the Supreme Soviet, they have the force of law.[18]

The concepts of state monopoly and the planned economy are maintained in pristine purity only in the fountainhead of communism, the Soviet Union, and its more conservative allies, the German Democratic Republic (GDR), and the Czechoslovak Socialist Republic (CSSR). Other CMEA members have modified their economies to allow for the play of some market forces. For example, since the Economic Reform in Hungary (1967–69) the monopoly of the FTOs has been broken or at least extended so that industrial enterprises could engage directly in foreign trade.[19] So far, more than 100 Hungarian enterprises have been authorized to deal directly with foreign companies. Some prices are also "free," *i.e.* , subject to market forces.[20] And three countries—Hungary, Poland, and Romania—permit, at least theoretically, direct foreign investment.

The organization of the nonmarket economy is a predominant factor for

MNCs in East-West trade, and its bureaucratic rigidity is a continuing frustration for many Western businessmen. On the other hand the socialist planners, particularly at the present time, are frustrated by the "unstable, crisis-inclined nature of the world capitalist market," as they perceive it. There have been calls for a "symbiosis of the planned and market systems." [21]

In fact many of the transactions in East-West trade have been uniquely structured in a legal format that in practice has allowed each partner to achieve its specific goals.[22] The structure of these transactions has substantially mitigated the concern of many Western firms about their inability to participate in what may be a substantial investment through the traditional means of a corporate entity with the equivalent of a board of directors and dividend payments.[23] The forms that have been employed in this trade will sometimes give an advantage to the MNC over smaller companies in dealing with the nonmarket economies. The Soviet Union, particularly, because of its need for very large-scale projects, prefers to deal with large multinational corporations rather than a group of smaller companies.[24] Finally, all of the CMEA states desire to have their trade relationships encompassed within the umbrella of bilateral intergovernmental relationships, a factor which increases the impact of political decisions upon trading relationships.

DOMESTIC REGULATION: IMPACT OF THE U.S. ANTITRUST LAWS ON MNC TRADE WITH CMEA STATES

It is appropriate now to consider how far these imperatives have been recognized by domestic regulation in the United States, and to examine in particular the impact of domestic antitrust law on MNC trade with nonmarket economies. Since the *Alcoa* case in 1945, the U.S. courts have exercised jurisdiction to decide upon the activities of legal entities operating outside the territorial jurisdiction of the United States.[25] This doctrine of extraterritoriality, felt by many to be a form of judicial imperialism, has been extended over the years beyond the antitrust area.[26] Of course, the extraterritorial application of U.S. laws also reaches the activities of the foreign subsidiaries of U.S. MNCs.

With the growth of trade and industrial cooperation between U.S. MNCs and the CMEA countries, the U.S. Justice Department has been forced to take a position on the potential antitrust aspects of such relationships. The most recent and enlightening statements on this subject are contained in the *Antitrust Guide for International Operations* issued by the Justice Department on January 26, 1977. These have been supplemented by comments made by Joel Davidow before the Advisory Committee on East-West Trade of the U.S. Department of Commerce on March 10, 1976, which in turn were amplified in an article published in 1978.[27]

It is unnecessary to consider all aspects of the *Guide for International Operations*, but it is appropriate to highlight some concerns of the Justice

Department in respect of East-West trade. Four potential areas of concern have been discussed: (1) exchange of information, (2) selling cooperation, (3) buying cooperation, and (4) patent and know-how licensing with reexport restrictions.[28]

Of course, the general rule is that U.S. antitrust law is applicable to any concerted restraint on competition which occurs abroad only if the intended and actual effect is to injure U.S. trade. In this context one is compelled by experience to agree with the conclusion set out in the Justice Department's guide "that a very large proportion of international business transactions involving American firms and/or American markets usually will not involve violations of U.S. antitrust law because such transactions will not adversely affect U.S. consumers or competitors."[29] In the case of East-West trade this position is emphasized by the extreme paucity of judicial precedent.[30]

Exchanges of information among competitors involved in East-West trade seem to be acceptable, if made for the sake of gaining experience or learning. Even if there is an intention to achieve a united front in buying or selling, it is unlikely that such an exchange would be illegal under the U.S. antitrust laws.

The Webb-Pomerene Act[31] permits U.S. exporters to join together in associations for the sale of goods abroad at uniform prices and it is felt by Mr. Davidow, for one, that joint selling abroad will not be illegal so long as it produces no adverse effects on U.S. consumers or competitors. The same is true for joint buying arrangements which are entered into by U.S. companies solely for the purpose of securing a lower price for U.S. consumers. However, the Justice Department recommends that "U.S. firms should avoid secret collusive arrangements in selling abroad, even when dealing with a monopolistic state buying agency, since such a buyer, like any other, is entitled to a fair nondeceptive treatment."[32] Such an attitude, whose premises merit serious and challenging consideration, reflects the general support of the U.S. Justice Department for the direction being taken by United Nations organs in respect of the regulation of restrictive business practices in international trade.

Nevertheless, joint ventures and consortia for major commercial projects in nonmarket economies, although almost always involving selling and buying, are normally acceptable so long as weaker firms are not unfairly excluded.[33] Fortunately this view coincides with practical realities. As previously mentioned the Soviet Union is mainly interested in extremely large-scale industrial complexes and projects. Many of these (there are now over thirty) are beyond the technological and financial resources of a single partner. To this extent current demands of East-West trade tend to significantly favor concentration of assets. The need for some sort of joint venture arrangement is almost inevitable except where one of the largest MNCs is involved. This becomes further complicated by the Soviet Union's desire to have buy-back compensation arrangements to finance its convertible currency obligations under these projects.

The Justice Department's greatest concern in East-West trade is the imposition of export restrictions in licensing arrangements with state-owned enterprises in nonmarket economies. These export prohibitions are intended by the licensing company to forestall the export of goods by such state monopolies at unreasonably low prices into Western markets. The department's position is that prohibitions on exports back to the United States may be illegal if they relate to products not produced by the licensed technology or last longer than a reasonable estimate of the life of the know-how involved. Moreover, the Justice Department believes that the U.S. corporations' fears can be adequately addressed under the U.S. antidumping laws.[34] Further, in the view of the department, prohibition of exports to Western Europe is not violative of U.S. antitrust laws since it does not affect U.S. commerce.[35] In fact, many MNCs conduct their East-West trade from Vienna and therefore remain effectively outside the jurisdiction of the EEC authorities as well.[36]

The present posture of the Justice Department is rather nebulous and unspecific. Its position seems to be based solely on the general principle of intended and actual adverse effect on U.S. commerce. This is very understandable considering both the intense political environment in which East-West trade exists and the lack of specific judicial guidance.

As a general observation, U.S. MNCs seem to be able to deal successfully with the monopolies of the nonmarket states without any modification of their general commitment to competition. This may be accounted for by the fact that the very size of the domestic U.S. economy places U.S. companies in a position of strength when dealing with such state enterprises, a factor considered subsequently in this article. Thus, a substantial concentration of assets and economic power will often present opportunities which would not otherwise exist for U.S firms in their dealings with nonmarket economies.

The biggest concern of U.S. companies seems to be with "whip-sawing" tactics sometimes employed by FTOs, whereby the later play the offers of potential suppliers off against each other and so utilize their monopolistic position to beat down the price offered.[37] This tactic is not peculiar to the nonmarket economies and may be found among domestic buyers. U.S. corporations experienced in East-West trade can deal with this phenomenon through long-term trading relationships with FTOs in their respective industries and through competent market research.

Another aspect of trade with CMEA states, the increasing use of countertrade arrangements, perhaps has potential ramifications for domestic antitrust liability. Such schemes, which are becoming an essential feature of East-West trade, require that any sale in convertible currency by a Western supplier shall be offset by a purchase in convertible currency of an equivalent amount by that supplier from its CMEA trading partner.[38] The reciprocity implicit in countertrade requirements, even where there is no contractual linkage between the sale and the counterpurchase (which is often the case), seems to chafe against some aspects of U.S. antitrust philosophy. The demands of such arrangements also favor large corporations at the expense of the smaller ones, since the latter will often not have the ability to absorb such counterpurchases within their own raw material requirements or may lack the ability to sell them in their own markets.

To the extent that the effects of countertrade requirements are felt on the U.S. domestic market, some judicial guidance may be developed which will amplify the unresolved antitrust aspects of East-West trade.

In contrast, it is the anticompetitive or protectionist legislation of the United States, the Trade Act of 1974,[39] which has had most influence recently on trade with the CMEA bloc. The use of the market disruption provisions of § 406 of the Act, while not necessarily consistent with the aims of U.S. antitrust policy, provides some indication of the antitrust approach which might be taken with respect to compensation and countertrade agreements.

This legislation has recently been used as an instrument of national policy. It is premised on the existence of a fundamental difference between the market and nonmarket economies which may place U.S. companies at a disadvantage in certain circumstances. For example, some U.S. chemical producers have attacked the famous compensation agreement made in 1973 between Occidental Petroleum and the Soviet Union.[40] This agreement, which is for a period of twenty years, requires *inter alia* an Occidental subsidiary to purchase each year from the Soviets 1.2 million metric tons of anhydrous ammonia. The U.S. producers complained that this arrangement had caused market disruption of the domestic industry within the meaning of the act because U.S. ammonia plants were running at about only 73 percent of capacity, which was below the break-even point, and such imports were causing the domestic producers either to sell at a loss or lose business. The Trade Act considers that market disruption exists "whenever imports of an article, like or directly competitive with an article produced by some domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry."[41] It should be noted that this test is intended to be more easily met than the "substantial cause" test of § 201 of the Act (the "escape clause" provision) which provides a more general protection against market disruption by imported products, a recognition, perhaps, of the special problems of trading with nonmarket economies.

The International Trade Commission (ITC), after investigating the complaint, determined by a three-to-two majority that market disruption did exist in the Occidental case. It recommended to the president that a three-year quota be imposed on U.S. imports of such ammonia from the Soviet Union. In fact, on December 11, 1979, the president decided not to follow the recommendation of the ITC and determined that it was not in the national interest to impose the recommended quotas. This decision was based upon economic argumentation.[42] Subsequently, by proclamation on January 21, 1980, the president reversed his decision. Taking emergency action under § 406(c) of the Trade Act, in the aftermath of the Soviet invasion of Afghanistan, he imposed the quotas which he had originally denied.[43] Although formally related to the economics of the situation, the decision was clearly a use of the act as an instrument of national policy in extreme circumstances. As such its impact on future East-West trade relationships may not be so severe.

Although not the first agreement subject to a Trade Act complaint,[44] the anhydrous ammonia complaint is the most significant, because the agreement initially had the blessing of the U.S. Exim Bank and the U.S. Department of Commerce; the State Department also stated that it was in the best interests of the United States. Moreover, since the Occidental deal was made, the CMEA economies have seriously declined to the point where without such compensation and countertrade arrangements the CMEA states are not in a position to purchase Western goods and technology, countertrade being essential to generate the convertible currency necessary to make such purchases.

Furthermore, the complaint and the Trade Act upon which it is based create difficulties in commercial planning, since due to changes in the domestic market situation a long-term arrangement apparently may be challenged much later, and perhaps repeatedly, in the course of its implementation. A success against Occidental may well have deterred other companies from entering into similar arrangements even with governmental support.

Many MNCs are now forced into compensation arrangements in order to maintain even their present level of trading with CMEA FTOs. Some licensers of technology have faced countertrade requirements which are as much as 140 percent of the value of the licensed technology. One MNC, the Pepsi-Cola Company, may be watching Occidental's experience with the ITC. In return for the right to supply two bottling and mixing plants in Bulgaria and to supply those plants with its concentrate it has entered into a 200 percent countertrade commitment which requires it to purchase Bulgarian bottles, confectionaries, mineral waters, furniture, electric and diesel forklift trucks, and wine.[45]

In conclusion (and further confirming the Justice Department's view) one can say that for most operations of large U.S. MNCs the domestic legislation is not a problem. Many of their sales are from their facilities in Western Europe and the countertrade products are usually utilized in these same facilities or sold off to European-based traders for disposal. Thus, domestic jurisdiction would rarely be obtained.

CMEA REGULATION OF MNC TRADE

Recent Developments in CMEA States

Recently, national legislation concerning direct foreign investment in the form of joint ventures has been enacted in three CMEA States; these efforts have considerable impact on the structure of MNC trade relationships with these countries. The problem of permitting a capitalist presence within a socialist economy remains an open issue in these countries. The more conservative states—the Soviet Union, the GDR, and the CSSR—do not permit such activity; only Romania,[46] Hungary,[47] and Poland[48] at present have laws permitting direct foreign investment. The Bulgarian authorities have indicated that a joint-venture law is in preparation.

The most striking feature of these local enactments is that they have chosen, for the implementation of such projects, a familiar capitalist modality—the joint stock company—very often relying on prerevolution legislation to prescribe incorporation details. By their very participation in a joint venture organized under traditional capitalist legal concepts, MNCs in CMEA countries are involved in the internal cultural, social, and political activities of the host country. This is in sharp contrast with the Yugoslavian joint-venture legislation which requires the foreign partner to invest directly in one of the domestic legal entities peculiar to that country's self-management system—the organization of associated labor[49] (such capitalistic forms of business organization as the joint stock company having been totally abolished). Nor is profit a recognized concept; rather the foreign partner shares in the *net income* of the work organization in the way specified in the joint-venture agreement.[50]

In 1977 Hungary followed the Romanian example by permitting the foreign partner to participate directly in the production process;[51] previously the foreign corporation had been represented only in the joint holding company established primarily for marketing the production of the domestic manufacturing unit utilizing the foreign partner's technology. Because this revision did not produce the interest in foreign investment that had been hoped for, in July 1979 Hungary published an explanatory decree which deals with the Western companies' concerns on accounting, taxation, profit transfer, repatriation of capital, and sales restrictions. Poland this year issued a similar decree,[52] foreign investment in Poland having been previously limited to "units of the non-socialized economy."[53]

Joint ventures form part of the domestic economy, operating in local currencies (although this is not always so in Romania) and becoming part of the national plan. Apart from the fact that no foreign investor may have more than 49 percent of the equity of the joint venture, the decrees contain none of the kind of terminology being discussed in the development of supranational codes. There is no reference to the environment, transfer prices, or the evaluation of technology except for some minor provisions in the new Polish regulations.[54] Apart from the organizational aspects of the joint venture, the main concern of the legislation is that sufficient foreign exchange be generated both for the benefit of the domestic economy, and also for the payment of royalties and profits to the foreign partner.[55] The details of the cooperation are determined by the partners during negotiations and embodied in a joint venture agreement.

It is proper to point out that in negotiation some other issues do emerge which touch on sensitive areas. Because of the planned nature of the domestic economy the foreign investor will usually share with its domestic partner a monopolistic position in the domestic market.[56] The opportunity to enjoy such a monopoly is an inevitable consequence of socialist planning. The "closed economies" of the CMEA members are intended to create a self-sufficient system of production. Even in normal trading activities, MNCs, and indeed any prospective seller into a socialist economy, cannot rely on the free enterprise standards of competition to make its sale:

> No matter how much more reasonably priced, or more suitable [this] product may be to the needs of the eastern European consumer than similar goods available locally, a sale will not be consummated unless the decision to buy fits prescribed government objectives. The Western exporter has learned from experience that [it] cannot count on the traditional factors that enter into the determination of consumer choice, (price, quality, utility) in order to secure the share of the market to which it feels entitled by reason of the efficiency of [its] production and the comparative value of [its] product.[57]

Thus in a joint venture the technology of the MNC helps to create local production to replace previously imported production. The planned economy is not competitive or market-oriented. It does not see the need for competition between its own production and foreign imports, or need the exclusion of such imports formalized by tariff managements or quotas. The state plan for a certain product will merely foresee that products previously imported are now supplied from the domestic production of a certain factory (the joint venture).[58]

In the recent Polish foreign investment legislation specific provision is made for the incorporation of such joint ventures within the national socio-economic plan.[59] Although this inclusion is somewhat tentative, perhaps because the Polish authorities are inexperienced with the impact of capitalist forces on their economy, such joint ventures are clearly included within the monopolistic centrally planned system.

CMEA states are, thus, not concerned with an MNC presence enjoying a local monopoly. Their objective is an improvement in their convertible currency balances, so that the big debate will be over the volume of exports and who will handle them.

Also at the present time the Hungarians are placing particular emphasis in detailed negotiations on the establishment of a research and development capability with the joint venture. The volume of price for supplies of raw materials by either partner to the joint venture will be another fundamental issue.

In summary, the recent national legislation has been very general, allowing the partners a great deal of flexibility to work out their own arrangement. Control against potential exploitation of the domestic partner by the foreign MNC is exercised through the licensing system in which the project will require the consent of various ministries and agencies of the state bureaucracy before its implementation may commence. The legal framework is designed to satisfy certain basic concerns of the foreign investor regarding its capital and the repatriation of profits and other sums due it. Such legislation is a pragmatic solution, avoiding the inhibition of theoretical principles to allow for the realization of tangible benefits to the domestic economy.

CMEA Approaches to MNC Concentration

The planned economies of the CMEA members essentially differ from market economies in that they are not responsive to the forces of supply and demand; that is, as noted earlier, they are not market-oriented. As such their approach to the tendencies toward concentration among MNCs, which appear to be causing concern in some quarters within the Western industrialized democracies, evidences a rather different perspective. Perhaps also the relevant needs of the market economies in trading with the CMEA bloc may be different than in trading with other regions.

One must remember that each of the CMEA economies is "administered by a group of highly centralized, specialized and substantially nationalized industries, each of which has a monopoly in a particular area of the economy. Each of these organizations has certain exclusive rights and functions and no other organization either internally or externally may exercise those rights or functions."[60] Consumer choice, free pricing, size, and competition are not relevant. They are vestiges of an "inferior" (capitalist) system which the planned economy has superseded.[61]

Accordingly, one would not expect to find provisions similar to the antitrust regulations existing in many of the Western democracies.[62] However, at least one small example in this field does exist. When Hungary introduced in 1968 the "New Economic Mechanism," the pricing system was modified from fixed official prices to allow for certain free prices.[63] Although these prices mainly concerned trading by individuals and small groups outside the socialized economy, the majority of imported products came within the free price category. The relevant statute provides that

> it shall be prohibited to enter into agreements on or in connection with the prices of products directed at or resulting in the barring of the emergence of competition, the creation of a monopolistic situation or the obtaining of unlawful financial or marketing advantages. Agreements defined in para (1) shall be null and void.[64]

However, since the price regulations have no extraterritorial effect they do not cover foreign trade contracts made with foreign parties.[65] Thus, even this provision will not be applicable to MNCs either in regular foreign trade activities for the reasons just stated or within the domestic economy, since their joint venture projects will be within the basic economy where free pricing does not apply.

Although the CMEA members are not particularly concerned with MNC concentration, they do seek modifications in their trading relationships with the West. These have been most clearly articulated in the position of Group D (the CMEA bloc) in the discussions on various Codes of Conduct being developed by UNCTAD and the U.N. Commission on Transnational Corporations.

The position of Group D in these discussions is equivocal. The members feel that such Codes should not be applied to their own state enterprises.[66] They emphasize the need to observe the principles of sovereignty, equality, mutual benefits, political and economic independence, and noninterference in the internal affairs of countries,[67] a position consistent with the nature of their nonmarket economies.

However, Group D does postulate the prohibition of some practices, considered restrictive practices, by MNCs. These include the imposition of restrictions after expiration of agreements, exclusive grant-back provisions, restrictions on research and price-fixing, and tying arrangements. On the other hand, Group D governments wish to retain some flexibility in this field and would provide that such "abusive practices" could be deemed nonobjectionable if the competent national authorities of the acquiring party's country consider such a determination to be in the public interest.[68]

In fact, apart from the political need to be seen as supporters of the developing nations, the CMEA bloc may not be interested in the debate over the conduct and role of MNCs in international trading relationships. They see it as a historical problem which is not of their making.[69]

Some commentators in the West also feel that the strict application of antitrust rules on companies dealing with the monopolistic enterprises of the socialist economies put such companies at an unfair disadvantage.[70] Although large MNCs have the economic strength to take care of themselves in dealing with the demands of CMEA trading partners, this is not necessarily true for small companies, particularly in dealing with the Soviet Union. Its predilection for large trading partners has already been mentioned,[71] and the size of its projects is such that a small company will be able to participate in them only by sharing the financial and other burdens.[72] Given the greater logistical problems for U.S. companies in trading with the CMEA members directly from their home production units in the United States, the following perspective of a Soviet minister may be apposite:

> Our projects are enormous. Almost every one one of them is worth a billion dollars. When I deal with European companies they do not have sufficient industrial, credit and management capacity. When I sign them up for a large project, I have five or six contracts, which gives me five or six headaches. When I deal with a large American company, I have only one headache.[73]

This is obviously not true of Fiat, Bayer, Krupp, or ICI. What the comment may mean is that the Soviet Union and its partners prefer the sheer size of the large MNC. After all, even if a particular Western industry became concentrated in the hands of one or a few companies, that would still provide them with a broad and competitive choice of trading partners.

CONCLUSION

The relevance of MNCs' experience with the nonmarket economies seems evident. There has been very little regulation of MNCs in this respect, whether on a national, regional, or supranational level. Yet in the last decade international trading relationships with those economies have grown impressively, surviving even the vagaries of the political relationships between East and West, to the mutual satisfaction of both economies and their respective governments.

The reason for this lies in the enlightened mutual self-interest on both sides. The MNCs have not sought to subvert the CMEA societies or to impose methods of business upon them. Rather they have utilized their entrepreneurial flexibility to develop new forms of business relationships which do not impose strains on the political theories of their partners. The nonmarket economies have taken a pragmatic and nondogmatic approach to trade with MNCs, explicitly recognizing, for example, the profit motivation of their foreign partners, in their foreign investment legislation.

To quote the words of Henri Schamm: "Clearly, business cannot prosper unless the host country itself has a chance to achieve prosperity; thus a responsible MNE will take into consideration, out of self-interest, the economic and social needs of the country in which it operates."[74] Such an approach has characterized much of the relationship between MNCs and the nonmarket economies. Yet perhaps the alien nature of those economies and the subtle encouragement of size which they emanate pose a dilemma which has been stated by Mr. Pisar and acknowledged by Mr. Davidow:

> I am raising a philosophical and a practical question. How are we going to react to what is happening abroad? Are we going to say to ourselves we must change our system in order to be able to meet the new kind of trade and competition problems that arise abroad or are we going to preserve our system intact?[75]

Such a question exaggerates the current circumstances of East-West trade, but it may do more than hint at the direction in which that relationship is evolving. Perhaps it is even more relevant to other aspects of the international trading relationships of the Western industrialized democracies and their market economies. Furthermore, this question is pertinent to U.S. antitrust officials and legislators who are pondering the proper response to corporate concentration both in the United States and abroad. It may be that the possible repercussions of any anticoncentration measures on East-West trade relations should be more fully discussed before concrete action is taken.

NOTES

1. The Council for Mutual Economic Assistance (CMEA) was established on January 30, 1949. One of its main functions was to be the exchange of economic experience, the extension of technical aid to member nations, and the rendering of mutual assistance with respect to raw materials, foostuffs, machines, and equipment. Its offices are in Moscow. Member states are the USSR, Poland, Hungary, Romania, Czechoslovak S.S.R., German Democratic Republic, Bulgaria, North Korea, Outer Mongolia, Vietnam, and Cuba. The CMEA is commonly known in the West as "COMECON."
2. Grishiani, *Prospects and Limits in Cooperation Deals*, 8 BUS. EASTERN EUROPE 89, 133–34; (1979). It should be noted, however, that in the conservative German Democratic Republic, such a transaction is still considered to be contrary to orthodox Marxist principles. *Id.* at 147.
3. The earliest example is the establishment of ARCOS in the United Kingdom just prior to the U.K.-USSR Trade Agreement of March 16, 1921.
4. Navrodne Bank, Zurich.
5. *Capitalistic Troubles for Eastern Europe*, BUS. WEEK, August 13, 1979, at 44.
6. The financial data used in the following paragraphs is summarized in *Id.* at 40–48.
7. *Id.* at 40.
8. *Id.* at 44. These comments must now, of course, be viewed in the light of the current U.S. grain embargo. It seems probable, however, that the Soviet Union will be able to obtain its requirements elsewhere so that its convertible currency expenditures will remain the same.
9. *E.g.*, S. PISAR, CO-EXISTENCE AND COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST 58–74 (1970).
10. *See* Maximova, *Industrial Cooperation Between Socialist and Capitalist Countries: Forms, Trends, and Problems*, in EAST-WEST COOPERATION IN BUSINESS: INTER-FIRM STUDIES, at 15(C.T. Saunders ed. 1977).
11. *See generally* Conner, *The State Trading Monopoly System*, in P.L.I. LEGAL ASPECTS OF DOING BUSINESS WITH THE USSR AND EASTERN EUROPE 9–19 (Practical Law Institute, No. 238, ed. 1977), for a description of the state trading monopoly system in the Soviet Union.
12. *See also*, GRUNDGESETZ, art. 9(5) (East Germany 1949), which states that "[t]he external economy, including foreign trade and foreign exchange economy, is a state monopoly."
13. Thus, in Poland Chiech, in Hungary Chemolimpex, and in the Soviet Union Soyuzkhimeksport are FTOs which have a monopoly of foreign trade in the chemical industry.
14. *See, e.g.*, Hungary Act No. IV of 1959; Civ. Code of the Hungarian People's Republic §§ 31–39; and Government Decree No. 11 of 1967 (13.V.) Korm, as quoted in I. SZASZ, HUNGARIAN STATUTES CONCERNING FOREIGN TRADE (1970).
15. The latest and probably most famous decision was the *Rolimpex* case in the United Kingdom which held that decisions of the Polish Ministry of Foreign Trade could constitute force majeure excusing the Polish sugar exporting monopoly from the performance of a supply contract. C. Czarnikow Ltd. v. Centrala Handlu Zagraniczneog Rolimpex, 1978 Q.B. 176; 1977–3 W.L.R. 677; 1978-1 All E.R. 81; 1977-2 Lloyd's Rep. 201,

C.A.; 1978-3 W.L.R. 274; 1978-2 All E.R. 1043, H.L. (E). Although this decision was probably technically correct, it highlights a problem of comparative law in accepting at face value the legislation of the socialist countries.

16. "A state enterprise may be founded by the minister, the head of an organ of national authority and . . . the executive committee of the council." Hungarian Decree No. 11 or 1967, § 1(2). "In appraising the foreign trade activities of enterprises vested with foreign-trading rights the founding organ shall proceed together with the Minister of Foreign Trade." Hungarian Decree No. 11 of 1967, §23(2).
17. *Id.*
18. Giffen, *The Planning Process and its Implications for Your Contract*, *supra* note 11, cit. 27–28. Finally, the control of the FTO exercised by its Ministry is confirmed by the fact that each foreign trade transaction requires a license from the Ministry of Foreign Trade.
19. Resolution No. 22 of 1967 (7. VI) G8 of the Economic Committee of the Hungarian Government.
20. Recently the Hungarian authorities went so far as to acknowledge the possibility that a Hungarian enterprise might reduce its labor force to improve its economic performance. Lorinczi & Dorian, *U.S.-Hungarian Joint Ventures: Prospects and Problems*, 10 L. POL'Y INT'L BUS. 1205, 1216–17 (1978). Similar trends may be observed in Poland and Romania. *Romania Considers Decentralized Planning*, 8 BUS. EASTERN EUR. 341–42 (1979).
21. Maximova, *supra* note 10, at 23. *See also* J.K. GALBRAITH, THE NEW INDUSTRIAL STATE 98–109 (1971) (suggesting that some devolutions of planning powers in the socialist countries are not a return to the market but a shift of some planning functions from the state to the enterprise under the imperatives of technology).
22. C. POPE, A SUPRANATIONAL ORDER: PERSPECTIVES AND PERCEPTIONS, 51–54 (1979).
23. Pisar, *The Changing Economic and Legal Environment for East-West Investment*, 10 INT'L LAW. 1, 7 (1976).
24. *See, e.g.*, Maximova, *supra* note 10, at 18; Pisar, *supra* note 23, at 5.
25. United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).
26. This doctrine is currently a matter of great controversy among Western industrialized democracies. A discussion of the issues raised in the uranium cartel cases involving Westinghouse and Rio Tinto Zinc is contained in Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW. 19 (1979). *See also*, Rosenthal, Benson, & Chiles, *Doctrines and Problems Relating to U.S. Control of Transnational Corporate Concentrations*, *ante*. The position of the U.S. Department of Justice, particularly vis-à-vis the U.K. Protection of Trading Interests Bill, is discussed in Flexner "Antitrust Enforcement in United States Foreign Commerce—"Imperialism or Realism?", a speech given before the Antitrust Law Section of the State Bar of Georgia in Atlanta, Georgia, December 6, 1979.
27. Davidow, *U.S. Antitrust, Free Trade and Nonmarket Economies*, 12 J. WORLD TRADE L. 473 (1978).
28. U.S. DEP'T OF COMMERCE, ANTITRUST IN EAST-WEST TRADE: EXCERPTS FROM THE MARCH 10, 1976 MEETING OF THE ADVISORY COMMITTEE ON EAST-WEST TRADE. 2–5 (1976).
29. ANTITRUST DIVISION U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INT'L OPERATIONS, 5 (1977).

30. *Supra* note 28 at 1.
31. The Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61–65 (1976).
32. Davidow, *supra* note 27 at 480.
33. *Id.* at 479.
34. For a complete analysis of U.S. Antidumping law, *see* ANTIDUMPING LAW: POLICY AND IMPLEMENTATION, 1 MICH. Y.B. INT'L LEGAL STUD. (1979).
35. Davidow, *supra* note 27 at 480. *See also*, ANTITRUST IN EAST-WEST TRADE, *supra* note 28 at 4.
36. *Eastern Europe in Brief*, 8 BUS. EASTERN EUR. 198 (1979).
37. ANTITRUST IN EAST-WEST TRADE, *supra* note 28 at 6–12.
38. For an overview of recent trends in "countertrade" developments, *see* 8 BUS. EASTERN EUR. 329–36, 361–76 (1979); 9 BUS. EASTERN EUR. 17–24, 41–48, 65–72 (1980).

Examples of typical countertrade commitments are:

Company X commits itself to buy, or to have bought through a third party, goods worth $_____ from the following FTOs _____ within _____ months following signature of the contract.

or

Company X hereby commits itself to take [e.g.] Hungarian goods described elsewhere in this contract by (date).

In such cases, it is wise for a company to specify with the utmost precision the types of goods it is willing to take. Without such limitation it may be forced to take products of inferior quality, or the products which it envisaged reselling may become unavailable because the FTO itself has found an export opportunity for that product and now wishes to use the countertrade obligation for the export of some other products.

Although many companies are faced with the need to enter into the kind of explicit countertrade undertaking described above, this is not always so. Companies with long-standing trading relationships with particular FTOs have been able to avoid such arrangements by demonstrating an existing balance in their trading relationships. This is likely to be true for MNCs which will have a greater flexibility to absorb raw materials, for example, produced in the CMEA states into their own western European production facilities.

Other complications exist in addition to the reciprocal aspects of countertrade. It is possible that from the FTO perspective, such a deal is a pure barter arrangement, in which no money exchanges are made. This can happen if the Western seller, having found a customer for the countertrade purchase, obtains from the latter a letter or credit that, after having completed a full circle of endorsements, ends up back in the hands of the Western seller as payment for its sale to the FTO.

Another problem for the Western company purchasing CMEA products under countertrade arrangements can be potential product liability claims. The company may in fact never see those products (for example to ensure their quality and compliance with specifications) because they have been resold through a broker and shipped directly to the ultimate purchaser. In the event of damage from defective products the company may be the most attractive defendant for the damaged party, because it may be difficult to make the FTO a party, or the plaintiff otherwise may be reluctant to pursue that course.

39. U.S.C. §§ 2101–487, (1976).
40. *See* Anhydrous Ammonia from the USSR, TA–406–5, USITC Publ. 1006 (1979).

41. 19 U.S.C. § 2436(e)(2) (1976).
42. H.R. Doc. No. 96–241, 96th Cong., 1st Sess. The decision was designed to ensure reasonable fertilizer prices for farmers and because it seemed likely Soviet imports would be replaced by imports from other sources.
43. Temporary Duty Increase on the Importation Into the United States of Certain Anhydrous Ammonia From the Union of Soviet Socialist Republics, 45 Fed. Reg. 3875 (1980) (to be codified in 3 C.F.R. Proclamation 4714).
44. *See* Certain Gloves from the People's Republic of China, TA–406–1, USITC Publ. No. 867 (1978); Clothespins from the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, TA–406–2, TA–406–3 and TA–406–4, USITC Publ. No. 902 (1978).
45. *Pepsi's Bulgarian Strategy: Reciprocal Marketing,* 8 Bus. Eastern Eur. 201 (1979).
46. Law No. 1, Official Bull. in No. 33 of SR of Roumania, March 17, 1971; Decree Nos. 424 and 425 on Constitution, Organization and Operation of Joint Companies in SR of Romania.
47. Decree of the Hungarian Minister of Finance on Economic Associations with Foreign Participation, No. 28 of 1978 *as amended by* No. 7 of 1977 and No. 5 of 1979.
48. Decree of Polish Council of Ministers on Establishing Joint Ventures in Poland and Their Operation, No. 24 of Feb. 7, 1979.
49. Official Gazette of SFRJ, No. 18/78, Art. 2.
50. Official Gazette of SFRJ, No. 18/78, Arts. 2 and 19.
51. Hungarian Decree No 7 of 1977, § 2(1), *supra* note 47.
52. Polish Decree No. 24 of 1979, *supra* note 48.
53. Decree No. 123/1976 of the Polish Council of Ministers, Preamble.
54. *But see* Law on Joint Ventures of the People's Republic of China, July 8, 1979, Article 5 (liability for losses) and Article 7 (tax holiday), relating to the question of advanced technology.
55. "Roumanian officials, point out that, in their view, the principal aim of the joint venture is to develop or increase exports to hard currency markets." Downey, *Joint Cooperation as an Instrument of East-West Trade, supra* note 11, at 121, 125.
56. "This motivation [for the foreign partner] may be dictated by a desire to eliminate or reduce the competition of other firms operating in the same geographical area . . ." Downey, *id.* at 125.
57. S. Pisar, *supra* note 9, at 189.
58. "The closed nature of their system permits, much more efficaciously than meets the eye, the implementation of ultraprotectionist commercial policies by means of simple administrative directives." *Id.* at 190.
59. Annex to Decree No. 24, *supra* note 52, Art. 26.
60. J.H. Griffen, *supra* note 18, at 30.
61. S. Pisar, *supra* note 9, at 23–24.
62. By contrast, in the "market socialism" of Yugoslavia, the basis of an antitrust law is found in the Constitution. Art. 255 . . . which states: *Any merger of organizations of associated labour and any other activity or conduct by organizations of state agencies aimed at preventing free movement, labour and resource pooling and free exchange of goods and services, or at establishing monopolistic positions on the unified Yugoslav market through which material and other advantages that are not based on labour are acquired and unequal relations in business created or which disrupt other economic and social relations determined by the constitution shall be prohibited.*

This provision is repeated in the Law on Associated Labour (Official Gazette of SFRJ No. 7/76, November 25, 1976) in Article 21(2) and criminal sanctions for such activities are provided in the form of fines in Article 647 of the same law.

However, one must bear in mind that the system of market socialism is also regulated by a system of self-management agreements and social compacts which introduce a strong element of planning into the economy.

63. SZASZ, *supra* note 14, at 16.
64. Decree No. 56 of 1967 (19.XII.) Korm. § 18(1) and (2).
65. SZASZ, *supra* note 14, at 7; Decree No. 56, *supra* note 64, at § 1(1).
66. Chance, *Codes of Conduct for Multinational Corporations*, 33 BUS. LAW. 1808 (1978).
67. Roffe, *UNCTAD: Code of Conduct on Transfer of Technology: A Progress Review*, 12 J. WORLD TRADE L. 351, 352 (1978).
68. *Id.* at 353.
69. *Editorial*, 14 J. WORLD TRADE L. 1 (1980).
70. Pisar, *Trade, Law and Peace: A Model Code for East/West Transactions*, 10 J. INT'L. ECON. 267, 280 (1975).
71. See text accompanying note 24, *supra*.
72. It should be noted, however, that as of 1973 MNCs were involved in only 46.5 percent of East-West trade agreements. Of this percentage just under one-half were agreements involving small MNCs (sales below $500 million and one to four foreign affiliates). C. H. MCMILLAN, *Forms and Dimensions of East/West Interfirm Cooperation*, in EAST-WEST COOPERATION IN BUSINESS, *supra* note 10, at 55.
73. Pisar, *supra* note 32, at 5.
74. Schamm, *The OECD Guidelines for Multinational Enterprises*, 12 J. WORLD TRADE L. 342, 348 (1978).
75. *Antitrust in East-West Trade*, *supra* note 28, at 5.